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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 619

WILMINGTON TRUST COMPANY, a Banking Institution Organized and Existing Under the Laws of the State of Delaware, Executor Under the Last Will and Testament of RICHARD C. duPONT, Deceased

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation of the State of New York

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949. No. 619.

Wilmington Trust Company, a Banking Institution Organized and Existing Under the Laws of the State of Delaware, Executor Under the Last Will and Testament of Richard C. duPont, Deceased,

v.

The Mutual Life Insurance Company of New York, a Corporation of the State of New York.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions of the United States District Court for the District of Delaware are reported in 68 F. Supp. 83, and 76 F. Supp. 560 and appear in the Record at page 33a and page 118a (as amended, at page 127a). The opinion of the United States Court of Appeals for the Third Circuit is reported in 177 F. (2d) 404, and appears in the Record at page 135.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTE INVOLVED.

The only statute involved is Section 496 of the Revised Code of Delaware 1935, the pertinent part of which is printed in the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

I. The law of Delaware being applicable to each question presented and there being no direct precedents in that State, did the Third Circuit Court of Appeals and the District Court for Delaware err:

(1) *With respect to the construction of the Delaware Incontestable Statute—*

(*a*) in following the numerous Federal and State court decisions which sustain the right of life insurance companies to limit or define the extent to which the risk of death by aviation is assumed; and

(*b*) in applying to the case at bar the Delaware doctrine that it must be assumed that when the Delaware Legislature adopted the statute, it intended that it be given the same judicial construction which the same phraseology had already received in the other states.

(2) *With respect to Petitioner's argument that the risk of military flying had been assumed—*

(*a*) in holding that the absence in the policy of a war clause was irrelevant to the interpretation of the scope of the aviation rider; and

(*b*) in holding that the aviation rider must be interpreted in accordance with its terms, and, being clear and unambiguous, may not be rewritten.

II. With respect to jurisdiction, whether this Court will review the decision of a Court of Appeals where—

(*a*) there is no conflict with the decision of another Circuit Court of Appeals;

(*b*) there is no probability of conflict with applicable local decisions;

(*c*) there is no Federal question involved;

(*d*) there is no claim of departure from the accepted and usual course of judicial proceedings; and

(*e*) the decision merely follows numerous similar decisions of other Circuit, District and State Courts.

STATEMENT.

The policies in suit were issued in 1935 and the following facts were known to and considered by Mutual Life before it wrote the aviation exclusion clause into the policies.

The late Richard C. duPont was a licensed pilot who owned and flew his own plane. During the three years immediately preceding the application for the policies he had flown some ninety thousand miles and spent some nine hundred hours in the air (55a). He was not only a famed glider expert, but had competed in soaring meets, was the holder of world records for sustained glider flight, and was in the business of manufacturing and selling sail planes or gliders (45a).

With knowledge of this background, Mutual Life included in the policies the usual and customary form of aviation clause (quoted in the Petition at Page 3), which (in effect) gave duPont full coverage only while flying in a regular commercial airliner and limited the Company's risk to the reserve on the policy if death should result from operating or riding in any other kind

of aircraft. Before doing so, it procured a letter from duPont stating that he understood and agreed that the aviation rider would be included in the policies (115a).

In April, 1943, duPont was appointed "Special Civilian Assistant" to General Arnold of the Army Air Forces, and was placed in charge of the Army's glider program (60a). He was never enlisted or commissioned in the military service. On the contrary, he was employed and served as a civilian technical and professional specialist pursuant to Section 8 of the Military Appropriations Act (67a).

In September, 1943, duPont was killed in a crash of a civilian-owned glider which was being tested for possible military use and in which he was riding as an observer (47a). Following his death Mutual Life paid the amount of the reserve on the policies, amounting to approximately $48,500.00, and the Petitioner brought suit claiming the balance of about $51,500.00, contending, first, that the Delaware Incontestable Statute nullified the aviation rider and second, that the aviation exclusion clause was not intended to cover "military flying".

ARGUMENT.

I. The Delaware Incontestable Statute Does Not Nullify the Aviation Rider.

A. *Mutual Life is Not Contesting the Policies. It Merely Seeks to Enforce Them in Accordance with Their Terms.*

The fundamental and simple first question involved in this case is whether a state life insurance statute prohibiting contests of a policy (except for reasons specified in the statute) after a period of two years from date of issue, precludes an insurer from limiting its coverage to the policy reserves if death results from riding in certain types of aircraft. Conversely, the question is whether

an Incontestable Statute nullifies a clearly expressed agreement between the insurer and the insured that the risk of death resulting from flying in private, unlicensed, or experimental aircraft is not assumed beyond the policy reserve.

There is nothing novel or unusual about this case. Aviation exclusion clauses similar to the one written into the duPont policies are a customary and usual limitation upon coverage and have been and are being written by life insurance companies throughout the United States. The question whether such limitations conflict with the purpose and intent of the Incontestable Statutes has been before State and Federal courts many times. These cases hold that the purpose of the Incontestable Statute is to assure a policy holder after a period of time that the *validity* of the policy will not be attacked by virtue of some real or alleged misrepresentation in the application or by reason of some other claim for forfeiture. See, for example, *Equitable Life Assurance Society* v. *Deem*, 91 F. (2d) 569, 571 (C. C. A. 4th 1937); *Jolley* v. *Jefferson Standard Life*, 199 N. C. 269, 154 S. E. 400 (1930); and *Reed* v. *Home State Life Ins. Co.*, 186 Okla. 226, 97 P. (2d) 53 (1934).

Virtually all of the numerous cases which have construed Incontestable statutes similar to the Delaware Statute have held that such statutes relate to and prohibit attacks upon the validity of the policy and do not preclude limitations upon or require the assumption of unduly hazardous risks of death.

The leading case in this field is *Metropolitan Life* v. *Conway*, 252 N. Y. 449, 169 N. E. 642 (1930). Justice Cardozo, who was then sitting upon the New York Court of Appeals, wrote the unanimous opinion of the Court. The basic question involved was identical with the point under discussion in this case and the Court construed the New York Incontestable Statute upon which the Delaware Statute here involved was later modeled. Justice Cardozo said:

"The provision that a policy shall be incontestible after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition. Like questions have arisen in other jurisdictions and in other courts of this State. There has been general concurrence with reference to the answer. • • •

"The meaning of the statute in that regard is not changed by its exceptions. A contest is prohibited in respect of the validity of a policy 'except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war' (sec. 101, subd. 2). Here again we must distinguish between a denial of coverage and a defense of invalidity. Provisions are not unusual that an insured entering the military or naval service shall forfeit his insurance. A condition of that order is more than a limitation of the risk. In the event of violation, the policy, at the election of the Insurer, is avoided altogether, and this though the death is unrelated to the breach. No such result follows where there is a mere restriction as to coverage. The policy is still valid in respect of risks assumed."

Among the many decisions to the same effect are *Pacific Mutual Life Ins. Co. of California* v. *Fishback*, 17 P. (2d) 841, 171 Wash. 244 (1933); *Green* v. *Mutual Benefit Insurance Co.*, 144 Fed. (2d) 55 (C. C. A. 1st, 1944); *Head* v. *New York Life Ins. Co.* and *Head* v. *Hartford Accident & Indemnity Co.*, 43 F. (2d) 517 (C. C. A. 10, 1930); *McBride* v. *Prudential Insurance Co. of America*, 147 Ohio St. 461, 72 N. E. (2d) 98 (1947); *Rossman* v. *Metropolitan Life Ins. Co.*, 71 F. Supp 592 (D. Maine

1937); *Burns* v. *Mutual Benefit Life Ins. Co. of Newark*, 79 F. Supp. 847 (W. D. Mich. 1948).

The case relied upon by the Petitioner as being contra to the great weight of authority is *State ex rel. Republic National Life Ins. Co.* v. *Smrha*, 138 Neb. 484, 293 N. W. 372 (1940). This case was not only primarily decided upon a clause in the Nebraska statute not contained in the Delaware statute, but has become moot because the Nebraska legislature adopted a statute the following year specifically permitting aviation exclusions of the type before the Court in this case.

Our first point is that the Lower Courts in this case, in deciding how a Delaware Court would construe the Incontestable Statute of that State, came to the sensible and logical conclusion that Delaware would follow the virtually unanimous decisions which have crystallized Justice Cardozo's views as being the law of the land. Had Metropolitan Life *v.* Conway not been followed in this case, it is obvious that a chaotic situation would have arisen throughout the country.

As indicated above, it is general practice to limit the aviation risk assumed in a life policy when the insured has a history of private flying, and two other companies (the Travelers and Ætna companies), which issued policies to duPont at the same time, inserted a similar clause (24a).* The reason for this is self-evident. duPont was a famed glider pilot and would have been unable to obtain this insurance or any life insurance had he not been willing to accept policies in which the risk of hazardous flying was not assumed. Insurance premiums are based upon life expectancies under normal conditions and do not contemplate issuance of policies to persons exposed to unusual hazards.

Mutual Life is not contesting or attempting to nullify the policies in suit. It is merely resisting an attempt to

*These policies are in suit in the District Court of Delaware awaiting the outcome of this case.

collect a sum in excess of the amount which the parties had agreed would be paid in the event the insured should die as a result of operating or riding in a glider or any type of aircraft other than a commercial airliner.

B. *The Application by the Lower Courts of the Rule of Chicago Corporation v. Munds.*

While there is no state decision which construes the Delaware Incontestable Statute, the courts of that State hold that it must be assumed that when the Legislature adopts an act it intends that it be given the same judicial construction which the same phraseology has already received in other states.

The Delaware Statute was modeled upon and in all material respects contains precisely the same phraseology as the previously enacted New York Incontestable Statute. Prior to the adoption of the Statute in Delaware, Justice Cardozo had decided *Metropolitan Life Insurance Co.* v. *Conway, supra.*

In reaching the conclusion that the Delaware courts would follow Justice Cardozo's reasoning and construction, the learned District Judge and the President Judge of the Third Circuit Court of Appeals in their respective decisions applied the doctrine of *Chicago Corporation* v. *Munds,* 20 Del. Ch. 142, 172 Atl. 452 (1934). That case involved the construction of a statute which had been modeled upon a substantially identical New Jersey Act which, prior to its adoption in Delaware, had been construed by the New Jersey courts. Citing Sutherland on Statutory Constructions, the Delaware Court said (p. 148):

> "Where the terms of a statue which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county or by that of another, that construction is to be given to the later statute."

The same principle was subsequently announced and affirmed by the Delaware Supreme Court in *Koeppel* v. *duPont*, 38 Del. 542, 194 A. 847 (1937), and by the Delaware Superior Court in *In Re:* Denning, 61 A. (2d) 657 (1948).

The attention of the Court is respectfully called to the fact that the learned President Judge of the Third Circuit Court was himself a distinguished Delaware lawyer before his elevation to the Bench. His conclusion in this case that a Delaware Court would apply the doctrine thus thrice announced seems to us to be virtually conclusive of the first question involved in this case.

II. The Aviation Clause is Clear and Unambiguous and Precludes Recovery for More Than the Reserve on the Policies.

Petitioner's second question involves a simple question of the construction of a contract.

As has been pointed out above, duPont's death resulted from riding in an aircraft on a flight which did not meet any of the tests for the full coverage stipulated in the aviation rider.

Mutual Life respectfully submits that the language of the aviation exclusion clause is clear, concise and unambiguous. Its contract assumed fully the risk of death resulting from flights as a passenger in commercial airliners but did not assume the risk of death (beyond the policy reserve) resulting from flight in any other kind of aircraft regardless of the type or the capacity in which duPont might fly. It said with respect to *all* flights that "death as a result of operating or riding *in any kind of aircraft whether as a passenger or otherwise* (except as a fare paying passenger, etc.) is a risk not assumed under this policy". Manifestly these words furnish no support for, but an absolute contradiction of an argument that the exclusion refers only to death as a result of operating or riding in aircraft not engaged in military flight.

The District Court and the Third Circuit Court held that the language of the policy clearly excluded from full coverage a flight as a passenger in a military aircraft or an aircraft being prepared for use on a military purpose or mission. Furthermore, these Courts pointed out the tendency of the courts of Delaware to follow New York and Massachusetts decisions and concluded that the Supreme Court of that State would give much weight to *Durland* v. *New York Life Insurance Co.*, 186 Misc. 580, 61 N. Y. S. (2d) 700 (1946), decided by the Supreme Court of New York, and *Green* v. *Mutual Benefit Ins. Co., supra,* decided by the First Circuit Court of Appeals under Massachusetts law. Both of these cases held, under quite similar facts and policies, that the absence of a war clause did not render an aviation exclusion clause ambiguous or render the limitation upon coverage inapplicable when the insured was flying in a military plane or was flying under orders in military or naval service.

In relying upon the First Circuit decision in *Green* v. *Mutual Benefit Insurance Co.* as indicative of Massachusetts law, the learned Circuit Judge of the Third Circuit Court of Appeals overlooked the identical decision of the Supreme Court of Massachusetts in *Hyfer* v. *Metropolitan Life Insurance Co.*, 318 Mass. 175, 61 N. E. (2d) 3 (1945), cited in Respondent's brief in Circuit Court, pp. 39, 41-2.

In that case, as in the case at bar and the *Green* case, no war service conditions were included in the policy. The aviation clause was again similar to the duPont clause.

The insured enlisted in the Army after the policy was issued, was assigned to the air corps, and acted as radio operator on an army transport plane. On October 1, 1942, while "on a scheduled flight" in this plane in Porto Rico, where he was stationed, the insured and the entire crew were killed by crashing into a hilltop obscured by clouds. The beneficiary made the same contention with respect to the effect of the absence of a war service clause, as was advanced in the *Green* case and is advanced in the duPont

case. The Massachusetts Court, in affirming a decision by the trial court, likewise rejected the argument. According to the court (p. 178):

> "One reason urged by the plaintiff why it [the aviation clause] should not apply is that, since there was no general provision excluding an obligation to pay for death due to war risks, the aeronautical clause must be interpreted as not precluding payment for death occasioned by aircraft flight in the armed services. This, however, is in direct conflict with its express language. The absence of a provision excluding death due to war risks did not operate to engraft an implied exception upon the unambiguous aeronautical clause, which relates to the risk itself and not to the reason for the exposure. * * * It is fallacious reasoning to say that, because the policy failed to exclude liability for war losses in general, the scope of the undertaking, which clearly did exclude certain aviation deaths, is through such failure to be construed to comprehend all war losses and so to cover war aviation deaths of the excluded kind."

Other cases to the same effect are *Thoma* v. *New York Life Ins. Co.*, 30 North Co. R. (Pa.) 369 (1946); *Knouse* v. *Equitable Life Ins. Co. of Iowa*, 163 Kan. 213, 181 P. (2d) 314 (1940); *McKanna* v. *Continental Assurance Co.*, 165 Kan. 289, 194 P. (2d) 517 (1948); and *Burns* v. *The Mutual Benefit Life Ins. Co. of Newark, supra.*

Respondent respectfully submits that the Third Circuit and District Courts in this case could have come to no other conclusion but that Delaware would follow the decisions referred to above and hold the contract in suit clear and unambiguous.

We respectfully dispute the relevance of Petitioner's argument that if duPont had at some later date been issued a different form of policy his coverage as an insured would have been broader than under the policies in

suit. Furthermore, we dispute the assumption that the quoted but irrelevant 1943 form of Mutual Life's policy would have assumed the risk of death resulting from a glider accident. We make this assertion for two reasons. First, duPont was never in military service and was serving in a civilian capacity at the time of his death and second, the 1943 form of policy also excluded from coverage operating, riding in, or descending from, *any kind* of aircraft, whether as a passenger or otherwise, except as a fare paying passenger in a commercial airliner.

III. The Case at Bar is not Within the Purview of Supreme Court Rule 38 (5)(b) and the Petition Should be Denied.

It seems apparent to Respondent that this case does not possess any of the characteristics usually considered important by this Court when it grants a Petition for a Writ of Certiorari.

There is no Federal question involved, the decision is not in conflict with the decision of another Circuit Court of Appeals, and there is no claim of departure from the accepted and usual course of judicial proceedings. As it has been pointed out above, the decision in this case merely follows numerous similar decisions of other Circuit, District and State Courts.

Since there is no Delaware decision on all fours with this case, the decision in the Circuit Court is not in conflict with applicable local decisions. On the other hand, a contra decision by the Third Circuit would have been in conflict with (*a*) the Delaware doctrine of *Chicago Corp.* v. *Munds,* and (*b*) the tendency of the Delaware Courts to adhere to and follow decisions of the Courts of New York and Massachusetts.

The argument (Pet. pp. 6, 7) that the Supreme Court should exercise its discretionary jurisdiction because it is *unlikely* that the Delaware state courts will ever have occasion to pass upon the questions is a novel one as to

which no hint appears in any known authority. Even the factual basis of the argument (Pet. p. 7) consists of conjectural inferences from non-record facts, unnecessary here to argue.

When analyzed, petitioner's argument amounts to this: Where the federal court decides a question of state law, absent an applicable state decision, the Supreme Court should grant certiorari because the authority of the unreversed federal decision is such that there is little likelihood that the state court, if the question is ever presented, will ever reach a contrary conclusion. It is desirable, says Petitioner, that in such case, the Supreme Court and not the Circuit or the District Court should announce the state law.

We can only suggest that if this be a reason for the granting of certiorari, the Supreme Court will be taking unto itself the added vast and onerous burden of deciding state substantive law questions in nearly every federal case where the state court has not spoken on the subject.

Respectfully submitted,

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